By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of section 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.

Order accordingly.

Solicitors: *Marina Yusof & Co.*

SITI AISHA BINTI IBRAHIM v. GOH CHENG HWAI

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdul Hamid F.J. and Abdoolcader J.) April 14 & May 5, 1982]
[Penang – Federal Court Civil Appeal No. 91 of 1981]

Practice & Procedure – Appeal – Finding of fact by trial court – Whether appeal court justified in interfering with finding.
Practice & Procedure – Pleadings – Failure of plaintiff to abide by pleadings – Whether fatal.

In this case in an action for damages the President Sessions Court Penang found that the respondent the driver of a car was negligent and that the appellant was guilty of contributory negligence. The evidence revealed that the respondent had seen the appellant an old lady some thirty feet away about to cross the road. The learned President found in effect that the respondent was negligent in failing to take precautions and that the appellant herself was not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. He apportioned the liability at 50-50. On appeal, Arulanandom J. allowed the appeal and ordered that the appellant's claim be dismissed with costs. The appellant appealed. In her pleadings the appellant alleged that she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road.

It was argued *inter alia* on appeal that the failure to abide by her pleadings was fatal and the appellant's claim should therefore be dismissed.

Held: (1) it is clear that the defendant/respondent was not misled, prejudiced or embarrassed or in any way taken by surprise or led astray by the plaintiff's pleading because from the very outset it was the contention and the case for the defendant that the plaintiff was walking across the road and not along the road;

(2) the question for determination by the learned President in this case was essentially one of fact. The finding of the trial court should not have been disturbed as there was no valid reason to show that the trial judge had not taken advantage of his having seen and heard the witnesses.

Cases referred to:

(1) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370.
(2) *Lim Soh Meng & Anor* v. *Krishnan* [1967] 1 M.L.J. 8.
(3) *Menah binti Sulong* v. *Lim Soo and Anor.* [F.C. Civil Appeal No. 36 of 1970] (unreported).
(4) *Esso Petroleum Co. Ltd.* v. *Southport Corporation* [1956] 2 W.L.R. 81, 91.
(5) *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail* [1981] 2 M.L.J. 10.
(6) *Playing Cards (Malaysia) Sdn. Bhd.* v. *China Mutual Navigation Co. Ltd.* [1980] 2 M.L.J. 182.
(7) *Yahaya bin Mohamed* v. *Chin Tuan Nam* [1975] 2 M.L.J. 117.
(8) *Chan Peng Fook* v. *Kan Pak Lee* [1974] 2 M.L.J. 197.

HIGH COURT.

Balachandra Mahesan for the appellant.
G. Rethinasamy for the respondent.

Cur. Adv. Vult.

Arulanandom J.: This was an appeal by the appellant/defendant from the decision of the President Sessions Court Penang wherein he awarded the plaintiff/respondent in Penang Sessions Court Civil Action No. 8(C) 370 of 1978 the sum of $5,600/– as general damages on the basis of 50% liability together with interest and $362/– as special damages for injuries sustained as a result of an accident on 19.7.77 in Bukit Tengah, Province Wellesley when she was knocked down by the Defendant/Appellant riding his motor cycle No. PW 3524.

The gravamen of the Appellant/Defendant's complaint was that the President had indulged in unwarranted speculation as to how the accident occurred and had not taken into serious consideration the pleadings and the evidence adduced in the case. The appellant claimed that the learned President was wrong in holding that the appellant/defendant was riding his motor-cycle without due care and attention and without reasonable consideration for other road users.

According to the Statement of Claim, the plaintiff/respondent was lawfully walking along the proper side of the road Permatang Batu, Bukit Tengah, Province Wellesley, when the defendant/appellant collided violently into her causing her severe bodily injuries.

According to the Statement of Defence, the accident was caused by the plaintiff/respondent crossing the said road from left to right as one faces Bukit Mertajam from Butteworth without first ascertaining that it was safe to do so.

At the trial itself, the plaintiff/respondent said in evidence "I was crossing the road from left side to right side before crossing. There were no vehicles on right and right before crossing. There were no vehicles on right and left. I was in the middle of the road near the white line when I crossed, I was knocked down."

Again in cross-examination she said "I honestly looked to left and right. I don't know how far. The road is a straight one. There was no vehicle. I could see ... I crossed the road when there was no traffic. Since there was no traffic on the road I could cross ... There was no vehicle when I crossed. I do not know from where the vehicle came." This was contrary to her pleadings and it is settled law that a plaintiff is bound by his pleadings but in view of my other findings in this case I do not think it is necessary to lay too much emphasis on technicalities.

Again contrary to her pleadings, in her police report the plaintiff/respondent admitted she was crossing the road.

This was the plaintiff's case. The only other piece of evidence was the sketch-plan to which I shall revert later.

The appellant/defendant's evidence which was not shaken in cross-examination was that he was riding his motor-cycle on the material date and time towards Bukit

Mertajam from Bukit Tengah at about 30 m.p.h. He was travelling 8-9 feet from the left side of the road. He saw someone standing on the side of the road when he was about 30' from the person.

He reduced his speed after that.

But when he came to about 10' from the person, who was an old lady, she crossed the road. He applied his brakes but could not avoid knocking into her. This accident took place near the centre of the road about 8-10' from the left edge.

His evidence is clearly supported by the sketch-plan which shows that the road is 25' wide. The appellant's motor cycle is lying on his side of the road near the centre, the motor cycle's brake marks are straight and on his own side of the road about 8-10' from the left edge of the road. Blood stains are beside the brake marks but on the other side of the road where presumably the plaintiff fell.

In the light of this evidence and there being no evidence of negligence whether it be excessive speed, zig-zagging, loss of control, overtaking etc. this court is unable to justify the President's findings that the appellant/defendant was negligent and liable for the injuries suffered by the plaintiff.

Furthermore certain findings of fact by the learned President suggest that he misdirected himself. In paragraph D of his Grounds of Decision (p14 of record) he says: "The defendant in his evidence said that he neither saw anyone walking along the side of the road nor anyone standing on the side of the road" when the defendant in line F5 of p9 of the record says categorically "I saw someone standing on the side of the road."

Again in paragraph C (p15 of Record) the learned President says "He (the defendant) said he first saw her 30' to his front attempting to cross the road. Despite this he was unable to avoid knocking into her. His version that he was driving at 30 m.p.h. is improbable and untrue. Driving at 30 m.p.h. one can without difficulty brake or swerve to avoid a pedestrian attempting to cross the road at a distance of 30 feet in front of him. Obviously the Defendant was driving his motor cycle without due care and attention and without reasonable consideration for other road users."

The findings of fact here are not warranted by the evidence and hence the whole basis of his conclusion that the defendant was driving his motor cycle without due care and attention and without reasonable consideration for other road users is void of all merit.

What the defendant said was he saw the plaintiff standing 30' away, but she only crossed when she was ten feet away, thus giving him no chance to avoid knocking into her inspite of braking.

Again the learned President says in paragraph A of p15 of the record: "It is inherently improbable that the Plaintiff crossed the road only when she was ten feet away from the Defendant's motor cycle, unless she wanted to commit suicide. Even on the assumption that she was careless and did not see the motor cycle the sound of the motor cycle also would be sufficient to have warned her of the proximity of the motor cycle."

The reasonable and logical inference from the facts alleged should have been that the plaintiff did not keep a proper look-out before crossing the road.

The court is aware that an appellate court would be loath to interfere with the findings of fact by a trial court. *(Benmax v. Austin Motor Co., Ltd.*[1]). But if the findings are grossing contradictory to the evidence and inferences are wholly unfounded, then the court not only has a right to interfere but should interfere in the interests of justice (see *Lim Soh Meng & Anor. v. Krishnan*[2].

On the evidence adduced before the learned President the only true verdict he could have given was a dismissal of the plaintiff's claim.

For reasons given above the appeal was allowed and the judgment of the court set aside. Counsel for appellant stated that he was not asking for costs. Hence there was no order as to costs.

From the above Judgment the respondent/plaintiff appealed to the Federal Court.

FEDERAL COURT.

Ajmer Singh for the appellant.

B. Mahesan for the respondent.

Cur. Adv. Vult.

Abdul Hamid F.J. (delivering the Judgment of the Court): In an appeal by the respondent/defendant against the finding of the President Sessions Court, Penang that the respondent was negligent and the appellant/plaintiff was guilty of contributory negligence, Arulanandom J. allowed the appeal and ordered that the appellant's claim be dismissed with costs. This appeal is against that decision of the learned Judge. We allowed the appeal and now give our reasons.

The main contention of the appellant is that the learned Judge erred in law when he interfered with the finding of fact made by the learned President.

On the other hand, counsel for the respondent argued that on the pleadings it was the appellant's case that at the time of the collision she was "lawfully walking along the proper side of the road" whereas in her evidence she said she was walking across the road. It is the respondent's contention that the failure to abide by her pleadings was fatal and the appellant's claim must therefore be dismissed. The case of *Menah binti Sulong @ Minah binti Sulong @ Aminah binti Sulong v. Lim Soo & Anor*[3] is relied upon as authority that a decision should be in strict accordance with the pleadings. This is reflected in that part of the speech by Lord Radcliffe in *Esso Petroleum Co. Ltd. v. Southport Corporation*[4] when he said –

"If an appellate court is to treat reliance as pedantry or mere formalism I do not see what part they have to play in our trial system."

The case of *Esso Petroleum Co. Ltd. v. Southport Corporation* can clearly be distinguished from the present case and similarly the case of *Menah binti Sulong.* The former was a claim based on trespass, nuisance and negligence and it was necessary to determine first the essential issue the trial turned upon. In that case the plaintiffs conducted their case and confined their evidence upon certain further and better particulars. It was held at p. 82 that "since every allegation in the statement of claim was rightly decided by the trial judge in a sense adverse to the fore-

shore owners, who had made no allegation of unseaworthiness, the ship-owners could not be held responsible because they did not negative a possible case which was not alleged against them in the pleadings *nor made against them in the course of the trial.*" (the emphasis is ours).

The latter case may also be distinguished from the instant case and this is clear from the judgment of Ong C.J. delivering the judgment of the court that both in the plaintiff's statement of claim and "repeatedly in her evidence she stated that she had alighted from the bicycle and was standing on the grass verge when the car knocked her down, being on its wrong side of the road whilst the defendants alleged that the bicycle came out without stopping at the junction."

The case under consideration is simple and straightforward. Although the appellant pleaded in her statement of claim that she was "lawfully walking along the proper side of the road," in her evidence she clearly said that she was walking across the road. Moreover in her police report included in the Agreed Bundle of Documents (Ex.P.1) at the trial she stated that she was crossing the road. Indeed the defendant in his defence and his evidence stated that the plaintiff was crossing the road from left to right.

It is clear therefore that the defendant was not misled, prejudiced, embarrassed or in any way taken by surprise, or led astray by the plaintiff's pleading because from the very outset it was the contention of and the case for the defendant, that the plaintiff was walking across the road and not along the road.

On appeal the learned Judge allowed the appeal but for different reasons. He appreciated that the plaintiff's evidence was contrary to her pleadings, but in view of other findings he did not think it necessary to lay too much emphasis on technicalities.

In this court in the case of *K.E.P. Mohamed Ali* v. *K.E.P. Mohamed Ismail*[5] the learned Chief Justice Raja Azlan Shah delivering the judgment of the court at p. 12 said –

"As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been properly excluded."

In another case *Playing Cards (Malaysia) Sdn. Bhd. v. China Mutual Navigation Co. Ltd.*[6] in this court, Abdoolcader J. delivering the judgment of the court, said that "although the pleadings in this case were not very precise, both parties knew the case presented by the other and justice required that the substantive issue between the parties be considered."

We are of the view that in the circumstances of this case the learned President of the Sessions Court was entitled to consider the case having regard to the whole of the evidence and to decide it in a manner as was just between the parties.

What remains for consideration is whether it was proper for the appellate court to disturb the finding of the learned President based on the material evidence before him and who had the advantage of seeing and hearing the witnesses. We hardly think so as the question for determination by the learned President was essentially one of fact. The principle that should guide an appellate court in this regard is to be found in Privy Council case of *Yahaya bin Mohamad v. Chin Tuan Nam.*[7]. This was a running down case where the crucial issue was on which side of the line the collision took place. The Judge considered the evidence of witnesses, the sketch plan and police photograph and arrived at a specific finding of fact. The Privy Council held that the finding of a Presiding Judge should not have been disturbed. It is only in a rare case that "an appellate court, lacking the advantage of seeing and hearing the witnesses, was justified in coming to a different conclusion from the trial Judge on the question of credibility." We are of the same view that an appellate court may be justified in coming to a different conclusion if there is valid reason to think that the trial Judge had not taken proper advantage of his having seen and heard the witnesses.

Evidence reveals that in the instant case the respondent saw the appellant an old lady some 30 feet away about to cross the road and the possibility of danger was therefore apparent. That being the case a special duty was created to take precautions and the failure by the respondent to take them was negligence (see *Chan Peng Fook v. Kan Pak Lee*[8] per Hashim J). The learned President, in our view, correctly found as a fact that the respondent was negligent and that the appellant was herself not free from blame when she attempted to cross the road without fully ascertaining that it was safe to do so. We see no valid reason to hold that the apportionment of liability 50-50 was unwarranted by the evidence.

For these reasons, we allowed the appeal with costs and restored the order made by the learned President.

Appeal allowed

Solicitors: *Rethina & Co.; Bala Mahesan & Co.*

SAMANTHA MURTHI v. ATTORNEY-GENERAL MALAYSIA & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah C.J. (Malaya) & Salleh Abas F.J.) April 26 & May 6, 1982]

[Kuala Lumpur – Federal Court Civil Appeal No. 39 of 1982]

Legal Profession – Application for admission to Malayan Bar – Advocate and Solicitor admitted to practise in Malaya but not holding practising certificate in Malaya – Whether in active practice in Malaysia – Meaning of "Malaysia" – Legal Profession Act, 1976, ss. 3, 11, 12, 13, 29.

Interpretation – Promoting general legislative purpose.

In this case the appellant petitioned for admission to the Malaysian Bar. He had read in the chambers of Mr. K.C.I. Reddy in Kuching and subsequently for seven months in the chambers of Mr. Vijandran in Kuala Lumpur. He was an Army officer but had been specially given leave to enable him to read in the chambers of Mr. Reddy. Mr Reddy had been admitted to practise as an advocate and solicitor in the High Court, Malaya but he had migrated to Sarawak and had not been in possession of a practising certificate in Malaya after 1963. The respondents opposed the petition of the appellant and the learned Judges of the High Court upheld the objections and dismissed the petition. It was held that Mr. Reddy was not an advocate and solicitor under section 3 of the Legal Profession Act, 1976, as he did not hold a practising certificates under section 29 of the Act authorising him to practise at the Malayan Bar; and